

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROSARIA PRIVITERA,)	
Plaintiff,)	
)	
v.)	CIVIL ACTION NO.
)	04-12394-DPW
)	
JO ANNE B. BARNHART,)	
COMMISSIONER OF)	
SOCIAL SECURITY,)	
Defendant.)	

MEMORANDUM AND ORDER
December 27, 2005

Rosaria Privitera brings this action seeking review of a final decision of the Commissioner of Social Security denying her disability and social security benefits. Because I find that the Commissioner's decision was supported by substantial evidence, I affirm.

I. BACKGROUND

Ms. Privitera was born in Italy in 1946 and attended school there through grade five, and possibly through high school.¹ Tr. at 14, 46, 183. Her primary language is Italian. Id. at 179. She understands and speaks a little English, but she does not write in English. Id. Ms. Privitera immigrated to the United States in 1974 with her husband, a bricklayer, and has been a

¹ In her application for benefits, Ms. Privitera reported that she had completed the twelfth grade. Tr. at 46. In her hearing before the ALJ, she stated that she had completed school through the fifth grade. Id. at 183.

United States citizen for approximately 25 years. Id. at 182, 185. She has four grown children. Id. at 181.

Ms. Privitera was employed for many years as a stitcher in a factory where she sewed women's clothing. Id. at 41. She stopped working in 2000, when the factory at which she worked moved to another country. Id. at 40.

On July 10, 2002, Dr. Daniel Cho saw Ms. Privitera to examine a mass that she had discovered in her right breast three days earlier. Id. at 122. A biopsy resulted in a diagnosis of infiltrating and in situ ductal carcinoma with lymphatic invasion. Id. at 118. Ms. Privitera underwent surgery on August 13, 2002, to treat the cancer. Id. at 99. Three days later, Dr. Abram Recht noted that her prognosis was good and that she was scheduled to begin chemotherapy and radiation. Id. at 70-71. He expected that the treatment would cause fatigue and other side effects, but he could not predict how severely she would be affected. Id.

On August 26, Drs. Steven Come and Thomas Caughey conducted a follow-up evaluation and noted that the lumpectomy had been "very successful." Id. at 95. They recommended a 12-week course of chemotherapy followed by radiation and tamoxifen. Id. They also noted that although her right arm was sore and had limited mobility, it had only been 13 days since the surgery. Id. at 96.

Ms. Privitera began chemotherapy on September 9, 2002, that was set to continue through November 2002. Id. at 92-93. She then had a number of visits during that time period with various

health professionals to address issues related to the cancer treatment and recovery. Dr. Joyce Jen noted on September 23, 2002, that Ms. Privitera had limited mobility of her right arm, and recommended range of motion exercises. Id. at 86. At a regularly scheduled follow-up visit one week later, Dr. Caughey reported that Ms. Privitera had tolerated her first round of chemotherapy "quite well". Id. at 80. He observed that her right arm was still stiff, but mobility had improved. Id. Holly Dowling, a nurse practitioner, saw Ms. Privitera on October 9, 2002. Id. at 77. She noted that Ms. Privitera was only doing one of her recommended arm exercises, and gave her written post-surgery exercises with pictures. Id.

Dr. Caughey wrote a letter dated October 21, 2002, and addressed "To Whom It May Concern," in which he stated that Ms. Privitera could not work while undergoing chemotherapy. Id. at 76. He explained that she had significant limitation in the range of motion of her right arm and was undergoing physical therapy. Id. He expected that following radiation treatment, which was scheduled to last from December to early January, she would be able to return to work in late January or early February. Id. Ten days later, Dr. Recht reported that although Ms. Privitera was limited in exercise due to fatigue from chemotherapy and radiation, her prognosis was "good". Id. at 146.

On November 6, 2002, Dr. Joanne Jones, a state agency physician, completed a physical residual function evaluation of

Ms. Privitera. Dr. Jones observed that Ms. Privitera could occasionally lift or carry twenty pounds; could frequently lift or carry ten pounds; could stand, walk, and/or sit for six hours in an eight-hour workday; and could push or pull without limitation. Id. at 148. Ms. Privitera appeared to have no postural, manipulative, visual, communicative, or environmental limitations. Id. at 148-151. Dr. Jones noted that fatigue was an issue and was likely to continue for some months. Id. at 149.

Dr. Nancy Keuthen performed a psychological evaluation on Ms. Privitera on November 12, 2002. Id. at 155. She found that Ms. Privitera suffered from no depression. Id. Although she had mild, periodic mood issues, they had no functional impact. Id. The only functional limitations Dr. Keuthen observed were related to Ms. Privitera's fatigue and the use of her arm. Id.

Ms. Privitera filed applications for Disability Insurance Benefits and Social Security Income ("SSI") payments on July 26, 2002. Id. at 34-36. These applications were denied both initially and upon reconsideration. Id. at 19, 24. On December 10, 2003, an Administrative Law Judge ("ALJ") held a hearing on Ms. Privitera's application for benefits, during which Ms. Privitera and her husband testified. Id. at 177-193.

On April 24, 2004, the ALJ issued a decision finding that Ms. Privitera was not "disabled" as defined by the Social Security Act because she did not have a severe impairment which lasted or was expected to last for a continuous period of twelve months. Id. at 14. On September 15, 2004, the Appeals Council

denied review of Ms. Privitera's application, rendering the ALJ's findings the final decision of the Commissioner. Id. at 7-9.

Ms. Privitera apparently reapplied for disability benefits, and was again denied again on December 12, 2004. Privitera's Response (Ex. 2). Drs. Jen and Caughey wrote letters addressed "To Whom It May Concern" dated December 23, 2004, and March 29, 2005, respectively, noting that Ms. Privitera continued to experience residual limited range of motion in her right arm as a result of the cancer surgery. Id. at Ex. 3, 4.

II. STANDARD OF REVIEW

The Commissioner's decision to deny social security benefits must be upheld unless she has "committed a legal or factual error in evaluating a particular claim." Manso-Pizarro v. Secretary of Health and Human Services, 76 F.3d 15, 16 (1st Cir. 1996). The Social Security Act specifically mandates that "(t)he findings of the Commissioner of Social Security as to any fact, if supported by substantial evidence, shall be conclusive." 42 U.S.C. §405(g).

Substantial evidence is "more than a mere scintilla." Richardson v. Perales, 402 U.S. 389, 401 (1971). The standard is met when "a reasonable mind, reviewing the evidence in the record as a whole, could accept it as adequate to support his conclusion." Rodriguez v. Secretary of Health and Human Services, 647 F.2d 218, 223 (1st Cir. 1981).

In reviewing the record for substantial evidence, a court must keep in mind that "(i)ssues of credibility and the drawing

of permissible inference from evidentiary facts are the prime responsibility of the" Commissioner. Id. "[T]he resolution of conflicts in the evidence and the determination of the ultimate question of disability is for [the Commissioner], not for the doctors or for the courts." Id.

III. DISCUSSION

Ms. Privitera claims that she is still disabled because she has not yet regained the full range of motion of her right arm, and as a result, cannot return to her work as a seamstress. Privitera's Response (Ex. 1). She further states that she is fatigued and has frequent doctor visits. Id.

In order to qualify for Disability Insurance or SSI benefits, a claimant must show that she is disabled within the meaning of the Social Security Act, 42 U.S.C. §401 et seq. See Bowen v. Yuckert, 482 U.S. 137, 146 (1987). The Act defines the term "disability" as:

inability to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than 12 months.

42 U.S.C. §423(d)(1)(A).

In evaluating whether a claimant falls within this definition, an ALJ considers the following factors in sequential order: (1) whether the claimant is currently performing substantial gainful work; (2) the severity of the claimant's impairment; (3) whether the impairment meets or equals a listing as set out in Appendix I; (4) whether the impairment prevents the

claimant from returning to past relevant work; and (5) the claimant's ability to perform a different type of work than she had performed in the past. 20 CFR §416.920 (a)(4). A threshold requirement is that the claimant's impairment has lasted or can be expected to last for a continuous period of twelve months. Pate v. Heckler, 777 F.2d 1023, 1026 (5th Cir. 1985).

Finding that Ms. Privitera had not engaged in substantial work activity, the ALJ moved to step two in the analytical sequence. Tr. at 15. There, he found that she did not have a "severe" impairment. Id. A "severe" impairment, for purposes of the Social Security Act, is one that "significantly limits [an individual's] physical or mental ability to do basic work activities" for twelve months or more. 20 C.F.R. §404.1520(c). In evaluating the severity of the impairment, the ALJ does not consider the claimant's age, education, and work experience. Id. An individual may have been disabled for a period of time in the past, but that does not necessarily mean that she currently has a severe impairment. Id.

Substantial evidence supports the ALJ's determination that Ms. Privitera did not suffer from a severe impairment for the required duration. The ALJ noted that Ms. Privitera has neither sought nor required treatment for breast cancer since the conclusion of her radiation therapy in November 2002. Tr. at 15. He pointed to Dr. Recht's description of Ms. Privitera's prognosis as "good" and Dr. Caughey's opinion that she should be

able to return to work in early February 2003.² Id. The ALJ noted that, apart from the fact that she was not gainfully employed, there was no evidence of any restrictions or limitations that would have prohibited work by Ms. Privitera after the treatment was completed. Id. From this, he concluded that Ms. Privitera's disability ended in November 2002, and did not last the required twelve months.

Although the reports of Dr. Caughey and Dr. Recht suggest that Ms. Privitera may have been disabled through early February 2003, this later date still does not satisfy the twelve-month requirement. The evidence, in any event, adequately supports the ALJ's ultimate conclusion. The ALJ's findings are consistent with Dr. Jones' evaluation, which indicated that Ms. Privitera was mentally able and could sit, stand, walk, and lift light objects in November 2002. Dr. Jones' only reservation was that Ms. Privitera's fatigue could last several months. Ms. Privitera claims that she still suffers from fatigue, but there is no indication in the record that the fatigue significantly limited or limits her ability to be gainfully employed for twelve continuous months.

Similarly, there is no indication that the limited range of motion of Ms. Privitera's arm is disabling within the terms of

² The ALJ also noted that Ms. Privitera left her previous employer more than a year before she was diagnosed with breast cancer. Tr. at 15. This fact appears to be irrelevant to the determination of whether Ms. Privitera was disabled. Accordingly, I attach no weight to this fact in my review of the ALJ's decision.

the Social Security Act. The evidence presented to the ALJ suggested that her arm was likely to improve, and did in fact improve by the completion of her treatment.³ Tr. at 77, 86, 80. Indeed, the report from Dr. Jones indicated that by November 6, 2002, Ms. Privitera could lift objects up to 20 pounds. Id. at 148.

Ms. Privitera bases this action on the claim that she cannot

³ Ms. Privitera has submitted letters from Dr. Caughey and Dr. Jen, addressed "To Whom It May Concern" and dated March 25, 2005, and December 23, 2004, respectively. Privitera's Response (Ex. 3, 4). The letters state that she has not fully regained range of motion in her right arm and that she has residual discomfort associated with extension and abduction of the arm. Id.

These letters were not part of the record that the ALJ considered in making his decision on April 24, 2004. The First Circuit has held that a court "may review the ALJ decision solely on the evidence presented to the ALJ." Mills v. Apfel, 244 F.3d 1, 5 (1st Cir. 2001) (reasoning that the "ALJ can hardly be expected to evaluate or account for the evidence that he never saw"). Thus, I cannot consider the letters in my determination of whether the ALJ's decision was supported by substantial evidence.

New evidence may serve as the basis for a remand for further consideration when that evidence is new or material. 42 U.S.C. §405(g) (The court "may at any time order additional evidence to be taken before the commissioner of Social Security, but only upon a showing that there is new evidence which is material and that there is good cause for the failure to incorporate such evidence into the record at a prior proceeding."). To meet this standard, the new data must be "meaningful - neither pleonastic nor irrelevant to the basis for the earlier decision." Evangelista v. Secretary of Health and Human Services, 826 F.2d 136, 139-40 (1st Cir. 1987).

In this case, the letters provide no new or material information. The record before the ALJ already established that Ms. Privitera lacked full range of motion in her arm. I cannot say that the ALJ's decision "might reasonably have been different" if he had considered the two letters. See id. at 140. Thus, remand to consider this additional evidence is not warranted.

not perform her work as a seamstress because of fatigue and the lack of full range of motion in her arm. Id. at 185, 192; Privitera's Response (Ex. 1). Whether an individual can resume her past occupation is considered in step three of the prescribed disability analysis. The ALJ never reached this question because he determined that Ms. Privitera did not meet step two's requirement of a "severe" impairment.⁴ As discussed above, the record contains substantial evidence supporting the ALJ's determination that Ms. Privitera had no impairment that significantly limited her ability to do basic work activities. Thus, the ALJ could properly conclude his analysis at step two of the decisional sequence.

IV. CONCLUSION

For the reasons set forth more fully above, I affirm the decision of the Commissioner of Social Security.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE

⁴ Even if he had reached this question and agreed with Ms. Privitera, she would not necessarily fit the definition of "disabled". The ALJ would still have to consider the fifth step in the analysis: whether Ms. Privitera is able to adjust to other gainful employment. 20 CFR §404.1520(a)(4).